IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 238

Companies Winding Up No 70 of 2017 (Summons No 1659 of 2017)

Between

STRATEGIC CONSTRUCTION PTE LTD

… Plaintiff

And

JH PROJECTS PTE LTD

… Defendant

GROUNDS OF DECISION

[Companies] — [Winding up] — [Stay of proceedings pending winding-up order]

[Building and construction law] — [Statutes and regulations] — [Building and Construction Industry Security of Payment Act]

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Strategic Construction Pte Ltd
v
JH Projects Pte Ltd

[2017] SGHC 238

High Court — Companies Winding Up No 70 of 2017 (Summons No 1659 of 2017)
Tan Siong Thye J
28 April; 24, 31 July 2017

27 September 2017

Tan Siong Thye J:

Introduction

1 The plaintiff, Strategic Construction Pte Ltd ("SCPL"), was the sub-contractor of the defendant, JH Projects Pte Ltd ("JHP") in a construction project for a military camp at Upper Jurong Road ("the Upper Jurong project").[1] SCPL made payment claims under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOPA") for amounts due for work done under the Upper Jurong project but JHP failed to pay. SCPL then commenced adjudication and, on 1 February 2017, obtained an adjudication award ("the AA") for the amount of $156,979.24 (including GST).[2] SCPL was granted leave to enforce the AA on 10 March 2017,[3] and issued a statutory

[1] Wong Kum Loong's 2nd Affidavit, 9 May 2017, p 84, para 4.

[2] Wong Kum Loong's 2nd Affidavit, 9 May 2017, p 84, para 3.

demand for a sum of $172,803.07 on 13 March 2017, which included the adjudicated sum, interest, and relevant costs.[4]

2 When payment was not forthcoming, SCPL took out Companies Winding Up No 70 of 2017 ("CWU 70") on 5 April 2017 to wind up JHP. In response, JHP took out the following applications:

(a) On 6 April 2017, JHP filed DC Summons No 1164 of 2017 ("DC SUM 1164"), in which JHP applied to pay the judgment debt in monthly instalments over 24 months.[5]

(b) On 10 April 2017, JHP took out Suit No 311 of 2017 ("Suit 311"), claiming that it had suffered loss and damage by reason of SCPL's failure to rectify defects in breach of another contract between the parties relating to a project in Tuas South Street ("the Tuas project").

(c) On 10 April 2017, JHP also filed Summons No 1659 of 2017 ("SUM 1659") asking the court to stay or restrain CWU 70 pending the disposal of the action in Suit 311. Alternatively, JHP asked the court to adjourn CWU 70 until DC SUM 1164 was determined.

JHP eventually withdrew DC SUM 1164.[6] There was, therefore, no need to consider its alternative application under SUM 1659. Thus, the only application that I had to consider was whether to stay or restrain CWU 70 pending the disposal of Suit 311.

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[3] Wong Kum Loong's 2nd Affidavit, 9 May 2017, pp 142-143.

[4] Wong Kum Loong's 2nd Affidavit, 9 May 2017, p 144.

[5] Wong Kum Loong's 3rd Affidavit, 12 May 2017, para 8.

[6] Lee Chong Chin's 1st Affidavit, 20 July 2017, para 14.

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3 After hearing the parties' submissions, I gave brief reasons why I allowed JHP's application and ordered CWU 70 to be stayed pending the disposal of JHP's action in Suit 311. As a condition of the stay, JHP was to pay the amount claimed in SCPL's statutory demand dated 13 March 2017 into court. SCPL is dissatisfied with my decision and has filed for leave to appeal under s 34(2)(*a*) of the Supreme Court of Judicature Act (Cap 322, Rev Ed 2007) ("SCJA") as the amount in dispute did not exceed $250,000. At the hearing of the application for leave to appeal on 18 August 2017, I directed the parties to s 34(2A) of the SCJA, as their written submissions made no reference to it. Section 34(2A)(*a*) of the SCJA provides that s 34(2)(*a*) does not apply to:

> (*a*) any case heard and determined by the High Court in the exercise of its original jurisdiction under any written law which requires that case to be heard and determined by the High Court in the exercise of its original jurisdiction; …

4 I then adjourned the hearing for the parties to consider the impact of this provision on the application for leave to appeal. When the court resumed after a short adjournment, SCPL withdrew its application for leave to appeal. Subsequently, SCPL filed its notice of appeal. I shall now explain in more detail my reasons in relation to the substantive question of whether to stay or restrain CWU 70.

Parties' submissions

JHP's submissions

5 JHP's primary argument was that it had a genuine cross-claim in Suit 311 against SCPL for the latter's failure to remedy certain defective works in the Tuas project.[7] In the Tuas project, JHP was the main contractor who had

[7] DWS, para 12.

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been employed by Teck Leong Industries Pte Ltd ("Teck Leong Industries"). JHP then sub-contracted the works to SCPL.[8] Eventually, it was discovered that there were certain defects in the Tuas project. JHP alleged that SCPL refused or failed to rectify these defects, and claimed damages against SCPL in Suit 311.[9]

6 To support its submission that it had a genuine cross-claim, JHP relied on a letter by SCPL's lawyers dated 30 May 2016, in which SCPL said that it was "willing to rectify the defects [in the Tuas project] so long as these [were] defects and not items involving wear and tear".[10] JHP argued that this showed that SCPL had acknowledged that it should and would pay for the defects to be rectified,[11] which reinforced the point that it had a genuine cross-claim against SCPL's winding-up application in CWU 70. This was because the amount that JHP claimed against SCPL, even allowing for reductions for modified calculations, still amounted to some $240,000, which exceeded SCPL's claim against JHP under its statutory demand.[12]

7 JHP acknowledged that apart from the debts that it owed SCPL, it also owed SCB Building Construction Pte Ltd ("SCB") $9,032,812.61.[13] But JHP submitted that this would not affect its financial position because SCB was a company related to JHP, with both companies sharing common directors and shareholders. This was confirmed by an affidavit filed by the deputy executive director of SCB, Gan King Ann ("Gan").[14] Gan confirmed that JHP was a

[8] Kris Chew Yee Fong's 1st Affidavit, 22 April 2017, para 10–11.

[9] Kris Chew Yee Fong's 1st Affidavit, 22 April 2017, para 23.

[10] Kris Chew Yee Fong's 2nd Affidavit, 8 May 2017, p 6.

[11] DWS, para 20.

[12] Lee Chong Chin's 1st Affidavit, 20 July 2017, para 44.

[13] Gan King Ann's Affidavit, 27 April 2017, para 6.

[14] Gan King Ann's Affidavit, 27 April 2017, para 6; pp 15-16.

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"commercially viable company with a fairly good track [record]", having $151,030,892.53 in turnover from 2007 to 2014.[15] Further, SCB had tabled a directors' resolution dated 10 July 2017 and passed it at an Extraordinary General Meeting ("EGM") on 18 July 2017 in which it said that "the shareholders of [SCB] would not demand repayment of all such amounts as are payable by [JHP] to [SCB] and/or its shareholders" and that this resolution "shall prevail" in the event that it conflicted with any other resolution.[16] According to JHP, this showed that it was in no real danger of being insolvent.

8 Finally, JHP further contended that SCPL had taken out CWU 70 for the collateral purpose of circumventing its contractual liability for the rectification of the defects in the Tuas project.[17] Rather than allowing SCPL to do this, and in the process cause irreparable harm to JHP's reputation and business,[18] the court should stay CWU 70 pending the determination of Suit 311.

SCPL's submissions

9 SCPL submitted that JHP was insolvent and therefore should be wound up.[19] Besides being unable to satisfy SCPL's judgment debt of $170,846.38, JHP owed a much larger amount of $9,032,812.61 to SCB.[20] If SCB called on this debt, JHP would be unable to repay and would be insolvent.

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[15] Gan King Ann's Affidavit, 27 April 2017, para 10; p 19.

[16] Lee Chong Chin's Affidavit, 20 July 2017, para 9; pp 14-18.

[17] DWS, paras 29-34.

[18] DWS, para 27.

[19] PWS, para 18.

[20] PWS, para 22.

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10 In support of these submissions, SCPL referred to JHP's application to pay off the judgment debt in monthly instalments over 24 months in DC SUM 1164. JHP had filed an affidavit by Lee Chong Chin ("Lee"), a shareholder of both JHP and SCB, to support its application for payment by monthly instalments. This affidavit referred to a directors' resolution taken by the common directors of JHP and SCB on 23 March 2017 and approved at the EGM on 6 April 2017, which stated that if proceedings were taken out against JHP to enforce the AA, then SCB's shareholders would "no longer provide any further financial support to preserve [JHP's] continuation as a going concern and accordingly, the shareholders [of SCB] would demand forthwith repayment of all such amounts as are payable by [JHP] to its shareholders".[21] SCPL said that this contradicted SCB's purported position that it would provide continual support to JHP.[22]

11 SCPL also drew the court's attention to JHP's directors' report for the year 2014, in which it was stated that "[the] company's continuation as a going concern is dependent on the related parties not demanding payment of the amounts payable."[23] Hence, SCPL submitted that there was no credible evidence that JHP was solvent.

12 In relation to JHP's cross-claim in Suit 311, SCPL argued that this cross-claim was not genuine.[24] It was filed "purely to stall" CWU 70 given that it could have been filed much earlier but was only filed within a few days after CWU 70

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[21] Lee Chong Chin's 2nd Affidavit, 27 July 2017, pp 7-11.

[22] PWS, paras 28-30.

[23] PWS, para 35.

[24] PWS, para 37.

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was taken out.[25] Furthermore, there were serious doubts about whether it was legally sustainable for the following reasons:[26]

(a) The cross-claim was a "double claim" (*ie*, there was double recovery). JHP claimed some $600,000 from SCPL for the latter's alleged failure to rectify the defects in the Tuas project. However, JHP also claimed another sum of some $200,000 because Teck Leong Industries had allegedly withheld that sum under its contract with JHP as a result of the unrectified defects. SCPL argued that the latter sum was properly part of the former sum and hence there was double recovery.

(b) JHP did not provide any breakdown for the $600,000 that it claimed for SCPL's failure to rectify defects in the Tuas project.

(c) JHP said that it was claiming damages because Teck Leong Industries had a performance bond that it could call on against JHP. SCPL argued that JHP could not rely on this bond as no details were provided, such as its terms, its expiry date, or whether Teck Leong Industries was planning to call on the bond.

(d) The sums that JHP claimed were inconsistent and changed in quantum between the affidavits of Lee, JHP's solicitor, and JHP's own statement of claim in Suit 311.

(e) After deducting the double claim and discounted figures, JHP's claim only amounted to some $142,300, which was less than the adjudicated sum in the AA.

[25] Wong Kum Loong's 2nd Affidavit, 9 May 2017, para 12.

[26] Wong Kum Loong's 3rd Affidavit, 12 May 2017, paras 13, 22.

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13 SCPL also argued that the cross-claim was not valid as it did not arise from the same contract, *ie*, the Upper Jurong project. The cross-claim originated from defective works under another contract, *ie*, that relating to the Tuas project.[27]

14 Apart from questioning the genuineness and legitimacy of the cross-claim under Suit 311, SCPL also made a broader objection in principle. SCPL argued that because its underlying claim was based on SOPA, the court should give effect to the policy behind SOPA, which was to allow efficient resolution of disputes in the construction industry and consequently facilitate quick cash flow. Giving effect to this policy consideration meant that the court should not stay CWU 70; Suit 311 could run concurrently in parallel.

The court's decision

Issues

15 The overarching issue before the court was whether JHP's stay application should be allowed. Based on the parties' submissions, there were a number of issues that I had to address:

(a) Was JHP's solvency a prerequisite to granting a stay? If so, was JHP solvent?

(b) Could JHP show that it had a genuine cross-claim that exceeded SCPL's claim, or any other reasons why the court should grant a stay?

(c) Was it relevant that SCPL's underlying claim arose under SOPA, which has the purpose of expediting cash flow?

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[27] PWS, para 39.

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16 As these issues cover discrete areas of law, I shall set out the law relevant to each issue in its respective section.

Was JHP's solvency a prerequisite to granting a stay?

17 SCPL's position was that JHP's solvency was relevant in that JHP should only be able to obtain a stay if it could show that it was solvent. SCPL relied on *Phang Choo Ong v Gilcom Investment Pte Ltd (LRG Investments Pte Ltd and another, non-parties)* [2016] 3 SLR 1156 ("*Phang Choo Ong*") for the proposition that it "is a prerequisite to any opposition of the winding up proceedings that [JHP] must demonstrate that it is solvent".[28] In *Phang Choo Ong*, Chua Lee Ming JC (as he then was) held that the court would take into account three non-exhaustive factors in determining whether to exercise its discretion to grant a stay of winding-up proceedings (at [18]-[20]):

> (a) The applicant must show that the state of affairs requiring the company to be wound up no longer exists. Where the winding up was on the ground of insolvency, the applicant must show credible evidence of solvency.
>
> (b) Nevertheless, a stay would be refused if granting the stay is detrimental to commercial morality and the interests of the public. Such detriment could take the form of the company being a grave commercial risk to potential investors and creditors, or the directors failing to comply with their statutory and common law obligations.
>
> (c) A stay would also be refused if the interests of the creditors, the members, and the liquidator are not served by the stay. For instance, a

[28] PWS, para 18.

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> stay is unlikely to be granted if there are no arrangements to pay the creditors.

SCPL relied on factor (a) and said that JHP needed to show credible evidence of solvency as a prerequisite to obtaining a stay.

18 On the other hand, JHP relied on cases such as *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 ("*Metalform*") and *Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)* [2011] 4 SLR 997 ("*Ultrapolis*") for the proposition that a stay application could be granted as long as JHP could show a genuine cross-claim that exceeded SCPL's claim (an issue which I shall come to later). These cases did not reference any requirement that the stay applicant (in this case, JHP) must demonstrate that it was solvent.

19 In my view, *Metalform* and *Ultrapolis* were more relevant to the present dispute. The reason for this was that, similar to the present proceedings, they concerned applications to stay winding-up proceedings where winding-up orders had not yet been made. *Metalform* was a case where the applicant sought an injunction restraining *potential* winding-up proceedings even though no such proceedings had yet been filed (*Metalform* at [4]). The Court of Appeal explained that at this stage, all that was needed to be shown was a likelihood that the winding-up proceedings may fail or that it is unlikely that a winding-up order would be made (at [77]). The court explained the policy rationale for this test as follows (at [82]):

> … the policy consideration [is] that the *commercial viability of a company should not be put into jeopardy by the premature presentation of a winding-up petition against it where it has a serious cross-claim based on substantial grounds*. Such a

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> petition may adversely affect the reputation and the business of the company and may also set in motion a process that may create cross-defaults or cut the company off from further sources of financing, thereby exacerbating its financial condition. So long as the court is satisfied that on the evidence there is a distinct possibility that the cross-claim may exceed the undisputed debt, it should give the company the opportunity to prove its claim rather than to allow a winding-up petition to be filed, with all the normal consequences attendant upon the filing of such a petition. *Businesses that have a chance of recovery should not be pushed into a state that makes it difficult for them to recover.*
>
> [emphasis added]

In other words, at this stage of the proceedings, because the applicant company was not yet declared insolvent by virtue of the winding-up order being made, it should not be "pushed into" handling the consequences that would come with being an insolvent company.

20 The same test was adopted in *Ultrapolis*, which concerned winding-up proceedings which had already been filed but which had not yet culminated in the making of a winding-up order. Here, too, Quentin Loh J applied the standard set out *in Metalform*, *ie*, that the applicant had to show a likelihood that the winding-up proceedings may fail or that it is unlikely that a winding-up order would be made. Loh J observed that although *Metalform* concerned an injunction application made *before* the filing of a winding-up petition, the Court of Appeal had "implicitly affirmed" that the same test would apply *after* the winding-up petition had been filed, as the policy rationale was the same (*Ultrapolis* at [23]). Indeed, the same principles would apply since a company which was the subject of a winding-up application but which had not yet been made the subject of a winding-up *order* should also not be treated like a company that had already been wound up (at [22]–[23]). He went on to explain that the test at this stage was equivalent to that of the applicant having to show a triable issue in resisting a summary judgment application (at [24]–[26]).

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21 In contrast, *Phang Choo Ong* concerned an application for the stay of a winding-up order that had already been made but had not yet been executed (*Phang Choo Ong* at [8]). Indeed, Chua JC explained at [18] that the principle in such cases was that where "the winding up was on the ground of insolvency, the applicant [for a stay] has to show that the company is solvent". The concerns at this stage are vastly different from the concerns *prior* to the making of a winding-up order, since at this stage the applicant company has already been declared insolvent.

22 This distinction is further buttressed by the fact that applications for a stay of winding-up proceedings before and after the winding-up order has been made are governed by two different provisions under the Companies Act (Cap 50, 2006 Rev Ed). Stays *prior* to the winding-up order are governed by s 258 of the Companies Act. Section 258 provides:

> **Power to stay or restrain proceedings against company**
>
> **258.** At any time after the making of a winding up application and before a winding up order has been made, the company or any creditor or contributory may, where any action or proceeding against the company is pending, apply to the Court to stay or restrain further proceedings in the action or proceeding, and the Court may stay or restrain the proceedings accordingly on such terms as it thinks fit.

23 In contrast, stays sought *after* the winding-up order has been made are governed by s 279(1) of the Companies Act (which was referred to in *Phang Choo Ong* at [13] as the governing provision), which provides:

> **Power to stay winding up**
>
> **279.—**(1) At any time *after an order for winding up has been made*, the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

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[emphasis added]

This section clearly operates at "any time after an order for winding up has been made". Hence, I found that the test laid down in *Phang Choo Ong*, namely, that the stay applicant must show that it is solvent, is not applicable as a prerequisite to granting a stay in the present case.

Were there sufficient grounds to grant a stay of CWU 70?

24 JHP pleaded three grounds in support of its stay application: (a) it had a genuine cross-claim that exceeded SCPL's main claim; (b) SCPL took out CWU 70 for a collateral purpose; and (c) refusing the stay would cause irreparable harm to JHP. SCPL disagreed with all three submissions and further submitted that it was JHP which had filed Suit 311 for a collateral purpose and therefore the court should not grant a stay of CWU 70. As I shall explain subsequently, SCPL's argument that Suit 311 was filed for a collateral purpose is not a standalone argument but just one factor in determining whether JHP's cross-claim was genuine. I shall therefore examine each of JHP's three submissions in turn.

Did JHP have a genuine cross-claim that exceeded SCPL's claim?

(1) The law

25 In the present case, JHP sought a stay of the winding-up proceedings (before a winding-up order was made) based on a cross-claim. In such cases, the Court of Appeal in *Metalform* at [74] and [77], and the High Court in *Ultrapolis* at [28]–[29], have confirmed that the court would exercise its discretion to stay the proceedings if:

(a) the applicant can show that there was a genuine cross-claim;

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(b) the applicant can show that the cross-claim was greater than the claim of the creditor seeking the winding up; and

(c) there are no other special circumstances.

26 Apart from these three requirements, the Court of Appeal in *Metalform* appeared to have implicitly approved in *obiter* a fourth requirement that the applicant must have been unable to litigate the cross-claim prior to the winding-up action (at [77]). In other words, if the applicant had a chance to litigate the claim in previous proceedings but chose not to do so, then it could not ask the court to stay the winding-up proceedings as that would be an abuse of the court's process. In *Ultrapolis*, however, Loh J rejected this as a separate requirement. He explained that although the failure to litigate the claim was a weighty consideration, it should properly be considered as one factor in determining whether the cross-claim was genuine (*Ultrapolis* at [36]). If the applicant could have raised the claim in previous proceedings between the parties but chose not to do so, it would not be "genuine" for the applicant to now raise it in separate, subsequent proceedings. The stay in *Ultrapolis* was ultimately refused because the applicant could have raised the matter in arbitration as early as four years prior to the stay application but chose not to (at [41]–[46]). I agreed with *Ultrapolis* and found that this is not a separate requirement but one factor in determining whether the cross-claim was genuine. Hence, JHP must show that it had (a) a genuine cross-claim that (b) exceeded SCPL's claim. The stay would then be granted unless SCPL could raise any special circumstances.

27 In relation to these two requirements, JHP only needed to show that there was a *triable issue*. As noted earlier, the Court of Appeal in *Metalform* held that all the applicant needed to show was a likelihood that the winding-up proceedings may fail or that it was unlikely that a winding-up order would be

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made (*Metalform* at [77]). This was because the applicant company, at this stage, had not yet been found insolvent and therefore should be given a chance to prove at trial that its cross-claim exceeds the respondent's claim without the attendant consequences of a winding-up order being made (at [82]). The Court of Appeal also considered and rejected the higher standard under New Zealand law that the applicant must show that the winding-up application is "bound to fail" (at [86]–[88]). *Ultrapolis* confirmed that the same standard of proof also applies where a winding-up application has already been made but a winding-up order has not been made. Loh J further explained that the applicant in cross-claim proceedings should not be "twice vexed by allowing the petitioning creditor to re-litigate the same issue at the hearing of the winding-up petition" (*Ultrapolis* at [25]). I adopted both these observations and found that JHP had shown that there was a triable issue. I now explain.

(2) Must the cross-claim arise from the same contract as the statutory demand?

28 In dealing with the issue of whether JHP had a genuine cross-claim, I had to address SCPL's argument that JHP's cross-claim had to arise from the same contract as SCPL's claim under the statutory demand. Although SCPL's submissions on this point did not explicitly fall within any of the requirements that I have noted at [25] above, this issue was still relevant. In essence, the issue was whether a "genuine cross-claim" under requirement (a) would necessarily be restricted to only a cross-claim under the same contract or whether *any* genuine cross-claim would suffice.

29 In this case, SCPL's winding-up action was based on the Upper Jurong project while JHP's cross-claim was based on unrectified defects found in a separate contract, *ie*, the sub-contract between the parties in respect of the Tuas project. Hence, SCPL argued that the cross-claim was not one that could be

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considered for the purposes of the stay application. In support of its position that the cross-claim needed to arise from the same contract, SCPL cited three cases: *Engineering Construction Pte Ltd v Sanchoon Builders Pte Ltd* [2011] 1 SLR 681, *Pacific Rim Investment Pte Ltd v Lam Seng Tiong and another* [1995] 2 SLR(R) 643, and *The Nanfri* [1978] QB 927.

30 I informed learned counsel for SCPL that while these cases set out the general principle that a cross-claim under a secondary contract must bear some nexus to the main contract in order for it to be set-off, these cases did not deal with how this principle applies in the context of winding-up proceedings. SCPL's counsel did not disagree with my observation on these cases. Hence, the principles elucidated in these cases were not directly relevant to the present case. I had to consider what the position was where cross-claims were pleaded against the backdrop of winding-up proceedings. I also had to consider whether the principle would change in the context of a winding-up action founded on a SOPA claim, as none of the cases cited to me dealt with claims under SOPA.

31 I shall begin by looking at the position under SOPA. In *Hua Rong Engineering Pte Ltd v Civil Tech Pte Ltd* [2017] SGHC 179, after surveying the relevant local and foreign authorities and the relevant similar provisions of other jurisdictions, I held that cross-claims under the SOPA regime are limited to cross-claims within a *single* contract, and not to claims across contracts. Essentially, this was based both on the text of SOPA (which consistently used the phrases "*a* contract" or "*the* contract", in the singular) (at [28]), and policy reasons (to limit the scope of what an adjudicator considers to give effect to the policy of quick and simple justice) (at [80]).

32 However, this winding-up action was not premised on SOPA. SCPL applied to wind up JHP under s 254(1)(*e*) of the Companies Act and JHP applied

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to stay this winding-up action under s 279(1) of the Companies Act. Unlike SOPA, the Companies Act does not stipulate that the cross-claim must also originate from the main claim in order for it to be relevant under a stay application. Neither do the provisions of the Companies Act indicate that only same-contract cross-claims can be considered. The policy concerns of quick and simple justice that underlie SOPA are also not present in the insolvency regime. The common law on insolvency also does not have any such restriction. As long as there is a genuine cross-claim that exceeds the sum of the statutory demand, the cross-claim can be considered by the court in determining whether to grant a stay.

33 In my view, this is the correct approach. Unlike an adjudicator under the SOPA regime, the court dealing with insolvency issues is not confined to the policy of quick and simple justice. The court is also not bound by the practical limitations that an adjudicator faces under SOPA, *eg*, the need to issue the adjudication award within a limited period specified under SOPA. Furthermore, winding up a corporate entity is a serious matter as it is akin to ordering the demise of a legal entity. Hence, when dealing with the broader issue of whether a corporate entity should be wound up, a triable issue of *any* genuine cross-claim that exceeds the amount of the statutory demand should be sufficient reason to grant the stay application.

34 Having established that JHP's cross-claim under a separate contract can be considered, I now turn to the issue of whether the cross-claim was genuine.

(3) Was there a genuine cross-claim?

35 JHP had shown that there was a triable issue in the form of a genuine cross-claim for unrectified defects under the Tuas project.

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36 The correspondence between the parties indicated that both JHP and SCPL proceeded on the assumption that SCPL admitted liability towards JHP in respect of the unrectified defects:

(a) On 30 May 2016, SCPL's lawyers sent a letter to JHP's lawyers specifically noting for the record that "our client is willing to rectify all defects so long as these are defects and not items involving wear and tear".[29]

(b) On 13 July 2016, SCPL's lawyers sent another letter to JHP's lawyers stating that "our client is willing to rectify the defects, but wants finality on the issue".[30]

(c) On 8 September 2016, SCPL's lawyers sent yet another letter to JHP's lawyers titled "SETTLEMENT PROPOSALS" in which SCPL proposed to move forward on the matter of defects in lieu of litigation. SCPL proposed to "undertake the rectification of defects" identified by a surveyor, one Lee Cheng Sung, in his report. After the rectifications were carried out, and a survey conducted by another independent surveyor jointly engaged by both parties, Teck Leong Industries would no longer have any claim against JHP, and similarly "JHP [would] no longer have any further claim against [SCPL]".[31]

(d) On 21 November 2016, after a "without prejudice" meeting between JHP, SCPL, and Teck Leong Industries, SCPL sent a letter to JHP and Teck Leong Industries through its lawyer. The letter proposed

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[29] Kris Chew Yee Fong's 2nd Affidavit, 8 May 2017, p 6.

[30] Kris Chew Yee Fong's 1st Affidavit, 22 April 2017, p 39.

[31] Kris Chew Yee Fong's 1st Affidavit, 22 April 2017, p 56.

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some options for resolving the issue of the defects. One of the suggested options was that SCPL would "[make] payment to [Teck Leong Industries] of a mutually acceptable and agreed amount as damages for diminution in value in lieu of rectifying the defects". Alternatively, SCPL proposed to rectify the defects according to certain parameters. The letter envisioned that upon rectification or payment, both Teck Leong Industries and JHP would release the sums that each had retained under the relevant contracts.[32]

(e) On 13 January 2017, SCPL's lawyers sent a letter to Teck Leong Industries offering $50,000 in "full and final settlement" of the latter's claims. With this payment, there would no longer be any claims between Teck Leong Industries and JHP, and between JHP and SCPL.[33]

The above letters clearly showed that SCPL was not only cognisant, but also agreed, that Teck Leong Industries had a claim against JHP to rectify defects in the Tuas project, and in turn, JHP had a claim for these defects against SCPL. Indeed, SCPL did not appear to dispute that the defects existed. Rather, it disputed only the value of the rectification works.

37 In response to JHP's submission that the correspondence between the parties showed that SCPL had accepted that there were defective works to be rectified, SCPL argued that JHP's claim for some $600,000 in damages, including rectification costs and retention money (in its amended statement of claim), was inconsistent and unsubstantiated. According to SCPL, the fact that the claimed sums fluctuated between various documents and/or affidavits filed

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[32] Kris Chew Yee Fong's 1st Affidavit, 22 April 2017, pp 119-120.

[33] Kris Chew Yee Fong's 1st Affidavit, 22 April 2017, p 124.

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by JHP suggested that the claim as a whole was not a genuine one to begin with. SCPL pointed out the following inconsistencies:

> (a) The quoted rectification costs were different. In an affidavit dated 22 April 2017 deposed by learned counsel for JHP, Kris Chew, he had placed the rectification costs at $321,300,[34] whereas Lee's affidavit placed the rectification costs variously at $420,000, $450,300, and $620,000.[35] Indeed, the statement of claim initially placed the amount at $600,000 but this was later amended to $420,000.[36]
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> (b) The total amount claimed, including both the rectification costs and the money retained by Teck Leong Industries, was different. The initial statement of claim placed the amount at $800,000 but this was later amended to $600,000.[37] Further, Kris Chew's affidavit dated 22 April 2017 placed the quantum at yet another amount of "approximately" $500,000.[38]

38 I did not accept SCPL's submission that these inconsistencies indicated that JHP's cross-claim was not genuine. The bases of JHP's cross-claim appeared to be consistent: rectification costs and retention money (retained by Teck Leong Industries). Only the quantification was different, and JHP appeared to have good reasons for the variation. On the different rectification costs, Lee explains in his affidavit that the rectification costs were only estimates by various surveyors. The rectification costs were initially pegged at

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[34] Kris Chew Yee Fong's 1st Affidavit, 22 April 2017, para 25.

[35] Lee Chong Chin's 1st Affidavit, 20 July 2017, para 39.

[36] Lee Chong Chin's 1st Affidavit, 20 July 2017, p 33.

[37] Lee Chong Chin's 1st Affidavit, 20 July 2017, p 33.

[38] Kris Chew Yee Fong's 1st Affidavit, 22 April 2017, para 28.

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$600,000 but this estimate was subsequently reduced to $420,000, which was consistent with the amendments in JHP's statement of claim in Suit 311. The reference to the other sums of $450,330 and $620,000 were also readily explicable. $450,330 was a quote from a *separate* surveyor, while $620,000 was the estimate which Teck Leong Industries said *their* surveyor had given for the rectification costs without reference to the findings of JHP's surveyor. This was simply a case of different surveyors coming to different views based on their own inspection of the site. There was sufficient evidence to show that JHP had raised a *triable issue* that there was a genuine cross-claim.

39 A similar observation could be made for the retention money. JHP amended its statement of claim in Suit 311 to reduce the sum claimed for the retention money from $200,000 to $180,000,[39] and Kris Chew's affidavit dated 22 April 2017 did present a different amount of $179,000.[40] However, the retention money was a percentage (5%) of the work done. That meant it would fluctuate based on the determination of how much work was done by JHP.[41] These fluctuations were also minor and SCPL did not appear to contest the retention money heavily. Hence, I found that there was a triable issue as JHP had a genuine cross-claim, notwithstanding that it had changed the quantum that it claimed.

40 In addition to the inconsistencies in the sums claimed, SCPL also referred the court to the chronology of events and said that it was clear that the cross-claim had only been filed by JHP in order to "stall" the winding-up proceedings. SCPL's point was that when it filed CWU 70 on 5 April 2017, the

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[39] Lee Chong Chin's 1st Affidavit, 20 July 2017, p 33.

[40] Kris Chew Yee Fong's 1st Affidavit, 22 April 2017, para 26.

[41] Kris Chew Yee Fong's 1st Affidavit, 22 April 2017, p 27.

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parties (including Teck Leong Industries) were still in the midst of negotiations. The parties continued their negotiations when JHP filed Suit 311 five days later, on 10 April 2017. Hence, SCPL argued that Suit 311 was filed in order to forestall CWU 70 and not for the genuine purpose of pursuing its rights under the contract.

41 I did not accept SCPL's submissions. SCPL's filing of CWU 70 would have demonstrated to JHP that SCPL was seeking to have JHP wound up. If JHP had been wound up, then it would no longer be able to pursue its claim against SCPL for the rectification works, even though in JHP's view (whether rightly or wrongly), it still had a claim that remained against SCPL. This was also why JHP argued during these proceedings that SCPL had taken out CWU 70 for a collateral purpose (a point which I shall examine in due course). Hence, JHP was justified in pursuing its claim under Suit 311 before it became impossible to do so by virtue of it having been wound up.

42 In any event, it appeared that the negotiations between the parties had long ceased by this time. SCPL's latest offer was contained in a letter to Teck Leong Industries dated 13 January 2017, which gave an offer of $50,000 for full and final settlement of the defects (see [36(e)] above). Teck Leong Industries replied rejecting the offer. SCPL's response was that the parties should not meet and Teck Leong Industries should engage its own building surveyor to liaise with SCPL's surveyor on the methods of rectification.[42] JHP was not involved in this set of correspondences as it did not reply to SCPL's latest offer. It therefore appeared that the parties were at an impasse in relation to the methods of rectification and JHP had good reason to pursue the claims in court.

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[42] Kris Chew Yee Fong's 1st Affidavit, 22 April 2017, pp 126, 128–129.

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43 Accordingly, I found that on the evidence shown, JHP did at least show a triable issue in a genuine cross-claim against SCPL.

(4) Did the cross-claim exceed SCPL's main claim?

44 The next issue that I dealt with was whether the sums that JHP claimed in its cross-claim exceeded SCPL's main claim. SCPL's position was that JHP's net cross-claim was only $141,000, which was less than SCPL's claimed sum. It derived this sum by deducting $180,000 in retention sums from $321,000, which was the estimate of JHP's rectification costs found in Kris Chew's affidavit dated 22 April 2017.[43] In contrast, JHP's position was that the court should, if at all, deduct the $180,000 from the claimed rectification costs of $420,000 reflected in the statement of claim.[44] This gives a remainder of $240,000, a sum which exceeded SCPL's claimed sum of $170,846.38.[45]

45 I accepted that there was at least a serious triable issue as to whether JHP's cross-claim, even after deducting $180,000 in retention costs, would still exceed SCPL's claim. There were a number of estimated costs put forth by JHP (see [38] above). Which of these sums accurately represented the costs of the rectification works would be a triable issue and SCPL would have its chance to cross-examine JHP's surveyors on that point. While I was cognisant that an applicant like JHP could not simply create a triable issue by making a bare assertion as to the sums that were due to it, this did not appear to be the case here. JHP's claimed sum was based on its own surveyors' estimates and SCPL did not challenge the *bona fides* of these surveyors. Accordingly, I found that

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[43] Kris Chew Yee Fong's 1st Affidavit, 22 April 2017, para 25.

[44] Lee Chong Chin's 1st Affidavit, 20 July 2017, p 33.

[45] Transcripts, 31 July 2017, p 45, lines 22-25.

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there was a triable issue as to whether JHP's cross-claim exceeded SCPL's claim.

(5) Were there special circumstances that demanded that a stay be refused?

46 Given that JHP could show that it had a genuine cross-claim that exceeded SCPL's claim, a stay would ordinarily be granted unless SCPL could show special circumstances to convince the court that the stay should be refused.

47 SCPL did not plead any special circumstances other than those that I have already mentioned, *eg*, SCPL's submission that JHP only brought the cross-claim to stall the winding-up proceedings (see [40] above). For the same reasons stated above, I found that this did not constitute special circumstances that demanded that a stay be refused. Accordingly, I granted JHP's application for a stay on the ground that it had a genuine cross-claim.

Did SCPL bring CWU 70 for a collateral purpose?

48 In addition to the argument that it had a genuine cross-claim to be litigated, JHP also submitted that SCPL had brought the winding-up proceedings for a collateral purpose. JHP alleged that SCPL wanted JHP to be wound up so that Teck Leong Industries would not have a claim against JHP, which would be in liquidation, with the result that there would also be no further claim against SCPL in relation to the defects.[46]

49 Strictly speaking, there is no need to consider this argument since I have already found that JHP has a genuine cross-claim. That would be reason enough to stay CWU 70 pending resolution of Suit 311. However, I will address this

[46] DWS, para 32.

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argument for completeness. Just as I did not accept that Suit 311 was brought for a collateral purpose, I also did not accept that CWU 70 was brought for a collateral purpose. CWU 70 was filed on 5 April 2017. By that time, the parties had been in extensive negotiations in relation to the rectification of defects and had also attended several meetings to resolve the matter. In particular, SCPL had been exploring various options for the parties to agree on the method of rectification and had even proposed a settlement sum of $50,000. It would make no sense that SCPL would choose to file CWU 70 only *at this point* to get around its obligation to rectify the defects, when it was already willing to take on the task of rectifying the defects and was only negotiating *how* to do so. If SCPL had wanted to avoid such obligations entirely it would not have bothered negotiating with JHP and Teck Leong Industries at all, let alone for such a long period and over so many letters.

50 It is true that in both *Metalform* and *Ultrapolis*, suggestions that the petitioning creditors were merely seeking to circumvent the defendants' cross-claims were rejected because these cross-claims had only surfaced *after* the winding-up proceedings (*Metalform* at [58]; *Ultrapolis* at [65]). However, this does not mean winding-up proceedings would invariably be for a collateral purpose if they were brought after the cross-claim was discovered (as in this case). SCPL applied to have JHP wound up for the purpose of seeking repayment of its debt. I did not think that JHP had raised enough evidence to show that SCPL had done so for any ulterior reason.

Would refusing the stay cause irreparable harm to JHP?

51 As with the argument on SCPL's collateral purpose, there was also no need for me to address the submissions that JHP would suffer irreparable harm if a stay were refused. But if there was a need to address it, I would have found

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that such proceedings would bring harm to JHP's reputation and business that could not be adequately remedied. However, as the Court of Appeal noted in *Metalform* at [59], this factor by itself would be insufficient to grant a stay. The irreparable harm suffered by JHP here was only significant when paired with the fact that JHP had a genuine cross-claim. It was only because JHP had such a cross-claim which remained unresolved that it was unfair for JHP to be the subject of a winding-up order.

52 In coming to the above conclusion, I was cognisant that SCPL's underlying claim was made under SOPA. Nevertheless, I held that although SCPL's underlying claim was based on SOPA, the standard of proof to be met in an application to stay the winding up was no different.

Was it relevant that SCPL's underlying claim arose under SOPA?

53 SCPL's position was that since its underlying claim was under SOPA, it should be entitled to "simply want [its] money" and that the parties could still carry on the negotiations or litigation (as the case may be) for the Tuas project.[47] While SCPL conceded that it could not find any authority directly on point, it referred to *Lim Poh Yeoh (alias Aster Lim) v TS Ong Construction Pte Ltd* [2017] SGHC 11 ("*Lim Poh Yeoh*") where the plaintiff refused to pay a judgment debt arising from an adjudication determination but started separate proceedings against the defendant for defective works. The defendant successfully obtained a stay of the plaintiff's new claim until the latter paid the judgment debt. Foo Chee Hock JC granted the stay on the basis that the plaintiff's new claim was an abuse of the court's process (*Lim Poh Yeoh* at [15]). SCPL submitted that in both *Lim Poh Yeoh* and the present case, the applicant

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[47] Transcripts, 31 July 2017, p 19, lines 1-3.

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for the stay was "obtaining an advantage that the SOPA regime does not even offer them".[48] Hence, SCPL asked the court to come to the same conclusion as was reached in *Lim Poh Yeoh* and compel JHP to pay the judgment debt (in this case, through CWU 70).

54 I disagreed with SCPL's submissions. Before I examined *Lim Poh Yeoh* and its impact on this case, I noted that the answer to this question was already dealt with in the relevant parliamentary debates during the second reading of the Building and Construction Industry Security of Payment Bill 2004 (Bill 54/2004) ("the SOP Bill"), which was later enacted as Act 57/2004. There, Mr Cedric Foo Chee Keng, then-Minister of State for National Development, stated the following (*Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 ("*Singapore Parliamentary Debates*") at cols 1118–1119):

> … Payment disputes involving insolvency are not covered under the Bill. If any one of the parties involved is insolvent, the provisions allowing direct payment and lien on unfixed materials will not be applicable. This is to avoid upsetting creditor priorities under existing insolvency laws. For example, if a respondent is unable to pay the adjudicated amount because he is insolvent or under judicial management, the principal, in this case, cannot pay the claimant directly either. …

55 In response to this application of the SOP Bill, Dr Amy Khor asked whether this would jeopardise sub-contractors' legitimate interests to be paid (*Singapore Parliamentary Debates* at col 1124):

> … Whilst direct payment from owners/developers to subcontractors would help to avoid suspension of work, I would like to ask the Minister, since the proposed Act would not over-ride the current law on insolvency, how then is the issue of the

[48] Transcripts, 31 July 2017, p 26, lines 1-6.

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> main contractor becoming insolvent resolved without jeopardising the legitimate interest of the subcontractors?

56 Mr Cedric Foo replied that while this might not give full effect to such sub-contractors' rights, this was acceptable as the purpose of efficient cash flow under the SOPA regime had to be subordinated to the "higher justice" of ensuring priority payments to creditors under the insolvency regime (*Singapore Parliamentary Debates* at col 1133):

> … She [*ie*, Dr Amy Khor] also asked why insolvency is not dealt with here, although payment woes in the construction industry are indeed a form of injustice. But in the area of insolvency, there is a higher justice that must be served. There is an established priority of payments that have to be made to different parties who have suffered as a result of a party going insolvent. So this priority should not be upset just because of the payment woes in the construction industry. So we have therefore left insolvent cases alone so as not to disrupt a process which is working well.

57 In other words, Parliament had already considered that a claim under SOPA might potentially conflict with a claim under the insolvency regime. It had expressly intended that the latter would prevail in such situations because the insolvency regime had far-reaching consequences, including that of preferring certain creditors over others due to their security over the company's assets. Allowing SOPA claimants to intrude into this regime would unnecessarily tilt the balance in favour of the construction industry over other creditors. This was an intrusion that Parliament was unwilling to endorse. Accordingly, even though the policy underlying SOPA is expeditious dispute resolution for quick cash flow, it cannot override the scheme under the Companies Act, which gives a company that is the subject of winding-up proceedings a chance to prove its cross-claims before a winding-up order is made and the attendant consequences flow, if it can show that there is a triable issue as to the cross-claim.

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58 I now turn to *Lim Poh Yeoh*. In *Lim Poh Yeoh*, the defendant had an adjudication determination in its favour and had taken several enforcement proceedings against the plaintiff to enforce its adjudication determination as a judgment debtor. Concurrently, the plaintiff claimed for damages in relation to defective construction works. The question before the court was whether the plaintiff's suit should be stayed because the plaintiff did not pay the judgment debt. Foo Chee Hock JC found that such "unilateral action" by the plaintiff "drove a coach and horses through the scheme established under SOPA and cynically defeated its legislative intent" (at [21]). Foo JC stayed the plaintiff's claim until it paid the judgment debt, since "parties should not be allowed to withhold payment of the adjudicated sum whilst seeking to effectively overturn the adjudication determination at the same time" (at [20]).

59 I noted that *Lim Poh Yeoh* did not concern a winding-up application and was hence of no assistance to the court in determining what was the appropriate balance to strike between an underlying claim arising out of SOPA on the one hand, and the insolvency regime on the other. Indeed, given the situation in *Lim Poh Yeoh*, it made eminent sense that SOPA, as the more specific regime, should take precedence over a general litigation claim. The same cannot be said for the insolvency regime, where there are special and specific considerations unlike general litigation.

60 In any event, the "legislative intent" underlying SOPA that Foo JC elucidated in *Lim Poh Yeoh* did not apply in this case. In coming to his decision, Foo JC considered significant that the plaintiff was able but unwilling to pay the judgment debt (at [12] and [22]). This would circumvent SOPA because a respondent challenging an adjudication determination under SOPA would have to first pay into court the adjudicated sum before he is allowed to challenge the adjudication (at [19]). The plaintiff in *Lim Poh Yeoh* could not get around this

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protection by filing a separate suit and using it as an excuse not to pay the judgment debt. But in this case, there was no circumvention of SOPA because JHP said that SCB was willing to pay the adjudicated amount into court for JHP.[49] This would be what JHP would have had to do under SOPA anyway if it had wanted to challenge an adjudication determination in court.

61 Accordingly, I found that both in principle and on the facts of this case, it would not make a difference that SCPL's underlying claim arose out of SOPA.

Conditions of stay

62 Given the potential policy concerns surrounding SOPA and the fact that JHP had indicated its willingness to pay the adjudicated sum into court as a condition for the stay of CWU 70, I ordered JHP to pay the amount that SCPL claimed in its statutory demand within seven days of the stay.

Costs

63 SCPL asked for costs of $10,000 (inclusive of disbursements) to be awarded to it in view of the amount of work and the affidavits filed. SCPL argued that it had a right to seek winding up against JHP notwithstanding that CWU 70 was eventually stayed. Conversely, JHP asked for costs of $15,000 (inclusive of disbursements) on the basis that costs should follow the event.

64 SCPL had instituted CWU 70 to wind up JHP. The latter took out SUM 1659 to stay the winding-up application. JHP had succeeded in its stay action and also offered to pay the amount of the statutory demand into court. In

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[49] Transcripts, 31 July 2017, p 51, lines 15-17.

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accordance with O 59 r 3(2), which prescribes the usual rule that costs follow the event, I ordered that SCPL was to pay costs of $5,000 to JHP (inclusive of disbursements) given that JHP had succeeded in its application to stay CWU 70.

Conclusion

65 For the above reasons, I allowed JHP's application for CWU 70 to be stayed pending the disposal of JHP's action in Suit 311. However, as a condition of the stay, I ordered JHP to pay into court the amount that SCPL claimed in its statutory demand dated 13 March 2017. This payment had to be made within seven days of my order (*ie*, within seven days of 31 July 2017). SCPL was to pay $5,000 in costs to JHP (inclusive of disbursements).

Tan Siong Thye
Judge

Andy Chiok (Michael Khoo & Partners) for the plaintiff in CWU No 70/2017 and for the respondent in Summons No 1659/2017;
Kris Chew Yee Fong (Zenith Law Corporation) for the defendant in CWU No 70/2017 and for the applicant in Summons No 1659/2017.

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